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No. 10-274

In the Supreme Court of the United States

GILLIAN B. LOYA, as Personal Representative of the Estate of Ricardo D. Loya, Deceased, et al.,

Petitioners,

v.

STARWOOD HOTELS & RESORTS WORLDWIDE, INC., et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

MELISSA O'LOUGHLIN WHITE
Counsel of Record
RODNEY Q. FONDA
DOUG TUFFLEY
COZEN O'CONNOR
1201 THIRD AVENUE, SUITE 5200
SEATTLE, WA 98101-3071
(206) 340-1000
mwhite@cozen.com

Counsel for Respondents Starwood Hotels & Resorts; Starwood Hotels & Resorts Worldwide, Inc.; Westin Hotel Management, L.P.; Raintree Resorts International, Inc.; Corporación Mexitur, S. de R.L. de C.V.; Douglas Bech; Raintree Vacation Club; and Walker Harmon

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[*additional counsel listed on inside cover*]

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Steven W. Block
Foster Pepper PLLC
1111 – 3rd Avenue
Suite 3400
Seattle, WA 98101-3264
(206) 292-9988

Counsel for Respondent
Whiski Jack Resorts and Club

Mike Fandel
Graham & Dunn
Pier 70
2801 Alaskan Way Ste 300
Seattle, WA 98121-1128
(206) 340-9693

Counsel for Respondent
Resort Condominiums
International LLC

Thomas C. Stratton
Eklund Rockey Stratton, P.S.
521 Second Avenue West
Seattle, WA 98119-3927
(206) 223-1688

Stephen L Hewitt
Kevin C. Almeter
Hewitt & Truszkowksi
4640 Lankershim Blvd
Suite 600
North Hollywood, CA 91602-1818
(818) 509-0311

Counsel for Respondents
Padi Worldwide and
Padi Americas

QUESTIONS PRESENTED

I. Whether the Petitioner has presented compelling reasons to grant the Petition, where the Ninth Circuit's Opinion affirming the district court's discretionary decision to dismiss Petitioner's Death on the High Seas Act claim in favor of a Mexican forum is supported by the district court's full consideration and reasonable balancing of properly stated public and private *forum non conveniens* factors consistent with decisions of this Court?

II. Whether the Petitioner has presented compelling reasons to grant the Petition, where the Ninth Circuit's Opinion affirming the district court's discretionary *forum non conveniens* dismissal of Petitioner's claims 1) abides by this Court's instruction that a plaintiff's forum choice "should not be given dispositive weight," and 2) does not conflict with other courts' decisions that necessarily reflect the discretionary balancing of the facts and circumstances of those cases?

PARTIES TO THIS PROCEEDING

The Petitioners are Gillian B. Loya, as Personal Representative of the Estate of Ricardo D. Loya, Deceased, and as Litigation Guardian Ad Litem for I.L. and G.L., the Surviving Minor Children of the Decedent, Ricardo D. Loya, and Estate of Richard D. Loya.

This Brief in Opposition is being filed by Respondents Starwood Hotels & Resorts;[1] Starwood Hotels & Resorts Worldwide, Inc.; Westin Hotel Management, L.P., Raintree Resorts International, Inc.; Corporación Mexitur, S. de R.L. de C.V.; Douglas Bech; Raintree Vacation Club; and Walker Harmon, and is being joined by Respondents Whiski Jack Resorts, PADI Worldwide, and Resort Condominiums International LLC.

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[1] "Starwood Hotels & Resorts," which has been referred to as "Starwood Trust," was a named party in the underlying proceedings, though it ceased to exist on April 10, 2006 and has not existed at any time subsequent to April 10, 2006.

CORPORATE DISCLOSURE STATEMENTS PURSUANT TO SUPREME COURT RULE 29.6

Starwood Hotels & Resorts Worldwide, Inc. states that it has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock. Westin Hotel Management, LP states that its ultimate parent corporation is Starwood Hotels & Resorts Worldwide, Inc. and there is no publicly held corporation that owns 10% or more of its stock.

Raintree Resorts International, Inc. states that it has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock. Corporación Mexitur, S. de R.L. de C.V. states that its ultimate parent corporation is Raintree Resorts International, Inc. and there is no publicly held corporation that owns 10% or more of its stock.

Whiski Jack Resort and Club states that it is a wholly owned subsidiary of Raintree Resorts International, Inc. and there is no publicly held corporation that owns 10% or more of its stock.

PADI Worldwide states that it has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock. PADI Worldwide has no publicly traded stock.

PADI Worldwide states that it is the parent corporation of PADI Americas. PADI Worldwide owns 100% (One Hundred Percent) of PADI Americas.

Resort Condominiums International LLC's ultimate parent corporation is Wyndham Worldwide

Corporation and no other public company owns 10% or more of its stock.

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INTRODUCTION

Petitioner presents no "compelling reason" to warrant this Court's jurisdiction. The decision below turns on its own facts, and will affect only the litigants in this case. Therefore, the Petition should be denied.

The Ninth Circuit correctly affirmed the district court's discretionary *forum non conveniens* dismissal of this lawsuit in favor of a Mexican forum. The district court fully considered and carefully balanced the properly stated *forum non conveniens* factors and determined that dismissal was appropriate. The district court's decision was reasonable and fell squarely within the district court's broad discretion. *Forum non conveniens* is, by design, a flexible doctrine, with district courts being called upon to make judgment calls on facts as they are presented. *See Williams v. Green Bay & W. R.R. Co.*, 326 U.S. 549, 557, 66 S. Ct. 284, 90 L. Ed. 311 (1946) (emphasizing that each *forum non conveniens* case "turns on its facts"). As such, the four *forum non conveniens* cases presented by Petitioner do not constitute a "conflict on the same important matter" to support review under Rule 10(a).

Petitioner nonetheless argues that this case is worthy of certiorari because it involves the Death on the High Seas Act, 46 U.S.C. App. § 761 ("DOHSA"). It is not. DOHSA claims are undoubtedly subject to dismissal under the longstanding doctrine of *forum non conveniens*. Petitioner does not deny this, but instead suggests that the purposes of DOHSA legislation should be "taken into account" as part of the *forum non conveniens* analysis. The district court in the underlying case did, in fact, take into account

DOHSA and its purposes. Pet. App. B at 37a-38a. In addition, contrary to the misstatements set forth in the Petition, the Ninth Circuit did not hold that district courts do not have to take into account DOHSA's exclusive remedy before dismissing a case based upon *forum non conveniens* grounds. *Compare* Pet. at 5, *with* Pet. App. A. Therefore, the proposed reason for granting the Petition, even if it were of sufficient importance, is not even at issue in this case.

A petition for a writ of certiorari is "rarely granted" where, as here, the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Rule 10. Because Petitioner's disappointment in the potential remedies available in Mexico does not justify discretionary review by this Court, denial of certiorari is appropriate.

STATEMENT OF THE CASE

While vacationing at a resort in Baja California Sur, Mexico, Ricardo Loya arranged and paid for a snorkeling/kayak trip off Cabo Pulmo (a small village on the Baja California peninsula 60 miles north of Cabo San Lucas) through Xplora Adventours. While en route to Cabo Pulmo, Mr. Loya decided to abandon the snorkeling/kayak trip he had purchased to participate instead in a scuba diving trip off Cabo Pulmo operated by a Mexican dive shop. On arrival at Cabo Pulmo, Mr. Loya separately paid for the scuba diving trip. He died while participating in these scuba diving activities, and was pronounced dead in Mexico. The autopsy took place in Mexico and Mr. Loya's death was investigated by Mexican authorities.

Mr. Loya's personal representative ("Petitioner") filed a wrongful death lawsuit against certain resort/timeshare entities ("Respondents"), seeking recovery of damages allegedly caused by the divers independently hired by Mr. Loya. Even though all acts relating to Mr. Loya's death took place exclusively in Mexico, Petitioner elected not to pursue the remedies that were available in Mexican courts. Instead, Petitioner filed a wrongful death lawsuit in King County, Washington under the laws of Washington state in pursuit of more lucrative remedies.

Respondents removed the lawsuit to federal court and filed a *forum non conveniens* motion to dismiss. Petitioner opposed Respondents' motion by asserting a Death on the High Seas Act, 46 U.S.C. App. § 761 ("DOHSA") cause of action that Petitioner argued was exempt from dismissal under the doctrine of *forum non conveniens*.

The district court considered and rejected Petitioner's *forum non conveniens* and DOHSA arguments. Pet. App. B at 26a. The district court quoted the statutory language of DOHSA and cited to two cases for the rule that DOHSA does not preclude *forum non conveniens* dismissal. Pet. App. B at 37a-38a. After carefully balancing the *forum non conveniens* factors, the district court dismissed Petitioner's lawsuit in favor of a Mexican forum. Pet. App. B at 26a. The Ninth Circuit affirmed, with all three judges agreeing that claims asserted under DOHSA can be dismissed under the doctrine of *forum non conveniens*. Pet. App. A at 9a ("DOHSA does not entitle Loya to have her case heard in a United States court." (footnote omitted)); Pet. App. A at 22a ("I agree with the Majority that ... the doctrine of *forum non*

conveniens applies to Death on the High Seas Act claims.") (Kleinfeld, J., dissenting[2]).

The Ninth Circuit denied Petitioner's motion for rehearing *en banc*. (Pet. App. A at 1a; Pet. App. C at 52a.)

REASONS FOR DENYING THE PETITION

I. PETITIONER'S DISSATISFACTION WITH THE RESULT DOES NOT WARRANT CERTIORARI.

At the heart of the Petition is Petitioner's dissatisfaction with the results below, specifically the quantum of potential remedies available in the alternate Mexican forum. The primary complaint raised by Petitioner is that injured United States citizens should have access to remedies as lucrative as those available under laws of the United States regardless of where the injury occurred.[3] Similarly,

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[2] The basis for the dissent does not relate to any of the issues raised in the Petition. *See* Pet. App. A at 21a. (disagreeing with the district court's "application of law to facts," maintaining that the case should be remanded for application of a different choice of law test "before we say it makes no difference").

[3] Petitioner incorrectly states that the district court entered "findings" about the amount of a wrongful death recovery available in Mexico and the cost of associated legal expenses. No such findings were entered by any court. Rather, the district court and the Ninth Circuit merely made reference to evidence presented by Petitioner. Pet. App. A at 14a; Pet. App. B at 40a. Likewise, no findings have been made with regard to the potential recovery under United States law (which Petitioner speculates about in the Petition).

Petitioner urges that the doctrine of *forum non conveniens* should be uniformly applied to allow United States citizens injured outside of the United States to litigate in United States courts.

Under Rule 10, Petitioner has the burden of demonstrating "compelling reasons" to accept the petition. Among the limited compelling reasons contemplated by the rules are (1) where there is a conflict on "the same important matter" between different Circuit Courts of Appeal, or (2) where a United States Court has decided "an important federal question in a way that conflicts with relevant decisions" of this Court. Petitioner failed to satisfy Rule 10, or in any way demonstrate why certiorari should be granted in this case.

The concerns raised by Petitioner have been squarely addressed and resolved in longstanding precedent from this Court, as reiterated in circuit court decisions. As the doctrine of *forum non conveniens* is fact-specific, its balancing of fully considered public and private interest factors must be, and is, flexible. They are not applied uniformly – by design. Petitioner's identification of different results presented in distinct court cases involving United States citizens injured outside of the United States is entirely consistent with the purpose and nature of the doctrine. There is no conflict or circuit split, or other reasonable rationale that would support the exercise of this Court's jurisdiction.

II. THE DOCTRINE OF *FORUM NON CONVENIENS* IS WELL ESTABLISHED AND NOT IN CONFLICT.

The *forum non conveniens* legal standards announced by this Court have been guiding courts in all circuits for over sixty years. District courts have inherent power to dismiss cases under the doctrine of *forum non conveniens*. "The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion[.]" *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511-512, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)).

District courts have wide discretion to dismiss a case under the doctrine of *forum non conveniens* unless dismissal would leave the plaintiff with no forum at all. *See Piper Aircraft*, 454 U.S. at 255. As long as the remedy in the alternate forum provides some relief, even if the potential damage award may be smaller, the remedy is adequate for purposes of the *forum non conveniens* doctrine. *Piper Aircraft*, 454 U.S. at 247, 254. Although a United States citizen's forum choice is one of many factors to be considered, it "should not be given dispositive weight[.]" *Piper Aircraft*, 454 U.S. at 256. "[W]here the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Creative Tech., Ltd. v. Aztec Sys. Pte., Ltd.*, 61 F.3d 696, 699 (9th Cir. 1995).

In making a determination on dismissal for *forum non conveniens*, the district court must first consider and balance the private interests of the litigants, including:

> the relative ease of access to sources of proof, the availability of compulsory process for unwilling witnesses, the comparative cost of obtaining willing witnesses, the possibility of a view of any affected premises, the ability to enforce any judgment eventually obtained, and "all other practical problems that make trial of a case easy, expeditious, and inexpensive."

Ravelo Monegro v. Rosa, 211 F.3d 509, 512 (9th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001) (quoting *Gilbert*, 330 U.S. at 508). The public interest factors that the court must consider in making a *forum non conveniens* determination include:

> court congestion, the unfairness of burdening citizens in an unrelated forum with jury duty, the interest in having localized controversies decided at home, the interest in trying the case in a forum familiar with the applicable law, and the interest in avoiding unnecessary conflicts of laws.

Ravelo Monegro, 211 F.3d at 512 (citing *Gilbert*, 330 U.S. at 508-09).

Addressing the contention that Mexico's comparatively lesser potentially-available remedies render it an inadequate forum, the Fifth Circuit recently remarked as follows:

> These many decisions create a nearly airtight presumption that Mexico is an available forum. We have held that if a defendant submits to jurisdiction, there is a presumption of forum availability ... .
>
> Unless plaintiffs can show evidence distinguishing this case from our precedent, an order from a Mexican court dismissing *this exact case* for lack of jurisdiction, or reliable evidence of some subsequent change in Mexican law that calls our earlier determinations into serious question, plaintiffs cannot prevail in their FNC defense.

In re: Ford Motor Co., 591 F.3d 406, 413 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 3467 (2010). Indeed, it is compelling that circuit courts sitting in jurisdictions that border Mexico have found their Mexican counterparts to be adequate alternatives for the purposes of *forum non conveniens*. *See, e.g.*, *Vasquez v. Bridgestone/ Firestone, Inc.*, 325 F.3d 665, 671 (5th Cir. 2003) (finding Mexico an appropriate forum for a wrongful death action arising from an automobile accident in Mexico, notwithstanding that the estates of Mexican residents killed in the accident had sued in the U.S.); *Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 381-83 (5th Cir. 2002) (even if Mexican law limits damages and strict liability in wrongful death actions almost to the point where the lawsuit ceases to become economically viable, it still is an adequate forum), *cert. denied*, 538 U.S. 1012 (2003); *Mizokami Bros. of Ariz. v. Baychem Corp.*, 556 F.2d 975, 978 (9th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978) (trial court did not abuse its discretion in dismissing action on *forum non*

conveniens grounds as all of the parties' transactions occurred in Mexico) (*per curiam*).

III. THERE IS NO "COMPELLING REASON" TO GRANT CERTIORARI.

A dismissed party's frustrations with not being able to litigate a case in the United States do not rise to the level of a compelling reason to grant certiorari. Petitioner's suggestion that all injured United States citizens should have an unfettered "right" to sue in the United States contradicts this Court's mandate that district courts fully consider and use discretion to balance certain public and private factors. *See Gilbert*, 330 U.S. at 508-09. This Court has confirmed that a United States citizen's forum choice "should not be given dispositive weight[.]" *Piper Aircraft*, 454 U.S. at 256. Longstanding and well-established principles of *forum non conveniens* confirm the flexibility in the doctrine that does, and should, empower district courts to make individual decisions in individual cases.

Addressing the contention that injured United States citizens should have access to lucrative remedies regardless of where the injury occurred, the Seventh Circuit remarked as follows:

> Only a tiny fraction of hotel guests in Mexico are from Illinois. Illinois residents may want a higher standard of care than the average hotel guest in Mexico, but to supplant Mexican law by Illinois tort law would disserve the general welfare because it would mean that Mexican safety standards (insofar as they are influenced by tort suits) were being set by people having little stake in those standards. Of course the

> plaintiffs do not argue that Illinois tort law should govern all accidents in Mexican hotels. They argue for something that is even worse – that each guest be permitted to carry with him the tort law of his state or country, provided that he is staying in a hotel that had advertised there.

Spinozzi v. ITT Sheraton Corp., 174 F.3d 842, 845-46 (7th Cir. 1999).[4] Because vacation guests do not carry with them the tort law of their state or country, the tort law native to Mr. Loya's home country is not extended to acts that took place during his Mexican vacation. Rather, the local law of Baja California Sur, Mexico, is the only law that will not impose potentially debilitating legal uncertainties. *See, e.g., Spinozzi*, 174 F.3d at 845-46.

In this case, Respondents have stipulated to jurisdiction in Baja California Sur, Mexico. Therefore, it is an alternate available and adequate forum, notwithstanding the differences in potentially-available remedies. The district court received briefing about DOHSA and its purposes, and addressed the issue in its order. Pet. App. B at 37a-38a. The district court quoted the statutory language of DOHSA and cited to two cases for the rule that DOHSA does not preclude *forum non conveniens* dismissal. Pet. App. B at 37a-38a.

The district court went on to fully consider and balance the private interests of the litigants and the public interest factors, and conclude that "Baja

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[4] *Spinozzi* was addressing a dispute over choice of law.

California Sur, Mexico, is an adequate and more convenient forum for this litigation[.]" Pet. App. B at 51a. The only relationship between this case and Washington state is that Mr. Loya resided in Washington prior to his death and his family continues to reside in Washington. By contrast, Mexico is the location of Mr. Loya's death. Medical attention was rendered in Baja California Sur, Mexico. The relationship among the parties is centered in Baja California Sur. Mr. Loya and his family elected to vacation in Baja California Sur, which is also the location where the negligent acts are alleged to have occurred. The owners and operators of the resort, and the companies allegedly involved with providing Mr. Loya the scuba diving trip, are all organized and exist under the laws of the United Mexican States, and maintain their places of business there. Quite simply, it is self-evident that the Mexican State of Baja California Sur has an overwhelming interest in having its law applied to this case. Thus, Mexico has the most significant relationship to this litigation.

On appeal, the Ninth Circuit unanimously rejected Petitioner's contention that claims brought under DOHSA are exempt from the doctrine of *forum non conveniens*.[5] *See* Pet. App. A at 9a ("DOHSA does not entitle Loya to have her case heard in a United States court." (footnote omitted); Pet. App. A at 22a ("I agree

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[5] Although Petitioner is no longer pursuing this argument, it is worth noting that DOHSA contains only permissive language addressing venue, noting that a plaintiff "may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative." 46 U.S.C. App. 761 (a) (emphasis added).

with the Majority that ... the doctrine of *forum non conveniens* applies to Death on the High Seas Act claims.") (Kleinfeld, J., dissenting). Ultimately, the Ninth Circuit affirmed the district court's *forum non conveniens* dismissal of this case, holding that the district court's decision was not an abuse of discretion. Pet. App. B at 20a.

Although it is beyond dispute that DOHSA claims are subject to dismissal under the longstanding doctrine of *forum non conveniens*, Petitioner urges this Court to grant certiorari to address whether the purposes of DOHSA legislation should be "taken into account" as part of the *forum non conveniens* analysis. The district court in the underlying case did, in fact, take into account DOHSA and its purposes. Pet. App. B at 37a-38a. Additionally, and contrary to the misstatements set forth in the Petition, the Ninth Circuit did not hold that district courts do not have to take into account DOHSA's exclusive remedy before dismissing a case based upon *forum non conveniens* grounds. *Compare* Pet. at 5, *with* Pet. App. A. Therefore, the proposed reason for granting the Petition, even if it were of sufficient importance, is not even at issue in this case.

Petitioner has identified no compelling reason for this Court to grant certiorari. Moreover, under the facts presented in this case, the decision of the Ninth Circuit affirming the discretionary district court decision is correct and should remain undisturbed.

CONCLUSION

In summary, the district court fully considered, and in its discretion reasonably balanced properly stated

public and private *forum non conveniens* factors consistent with decisions of this Court. As part of its analysis, the district court considered Petitioner's forum choice and the purposes of DOHSA. Ultimately, the district court exercised its discretion to dismiss this case in favor of a Baja California Sur, Mexico forum.

Petitioner's dissatisfaction with the result is insufficient to warrant this Court's jurisdiction. It is well established that a forum is not rendered inadequate simply because that forum provides lesser potentially-available remedies. Furthermore, given the fact-intensive nature of each *forum non conveniens* analysis in each case, the mere existence of other cases that reached different results does not evince a conflict in decisions under Rule 10(a). In fact, considering that Petitioner's asserted errors allege erroneous factual findings and the misapplication of a properly stated rule of law, this Petition is the type that is "rarely granted." *See* Rule 10.

Petitioners have not and cannot come forward with any compelling reasons for this Court to grant the Petition. Therefore, the Petition should be denied.

Respectfully submitted,

Melissa O'Loughlin White
Counsel of Record
Rodney Q. Fonda
Doug Tuffley
COZEN O'CONNOR
1201 Third Avenue, Suite 5200
Seattle, WA 98101-3071
(206) 340-1000
mwhite@cozen.com

Counsel for Respondents Starwood Hotels & Resorts; Starwood Hotels & Resorts Worldwide, Inc.; Westin Hotel Management, L.P.; Raintree Resorts International, Inc.; Corporación Mexitur, S. de R.L. de C.V.; Douglas Bech; Raintree Vacation Club; and Walker Harmon

Steven W. Block
Foster Pepper PLLC
1111 – 3rd Avenue, Suite 3400
Seattle, WA 98101-3264
(206) 292-9988

Counsel for Respondent Whiski Jack Resorts and Club

Thomas C. Stratton
Eklund Rockey Stratton, P.S.
521 Second Avenue West
Seattle, WA 98119-3927
(206) 223-1688

Stephen L Hewitt
Kevin C. Almeter
Hewitt & Truszkowksi
4640 Lankershim Blvd Suite 600
North Hollywood, CA 91602-1818
(818) 509-0311

Counsel for Respondents Padi Worldwide and Padi Americas

Mike Fandel
Graham & Dunn
Pier 70
2801 Alaskan Way Ste 300
Seattle, WA 98121-1128
(206) 340-9693

Counsel for Respondent Resort Condominiums International LLC